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Symposium: Justice for the Child^{*}

Failing Juvenile Courts, and What Lawyers and Judges Can Do About It

Emily Buss^{**}

A small group of people sit in a courtroom. At a table in the front near the judge's bench, two apparent professionals with large stacks of folders chat loudly and jovially about last night's game, then about a mutual friend who just changed jobs and the funny memories about him they share. At some point their faces get a bit more serious, their voices drop, and they talk about "placement," "compliance," and "conditions," clearly confirming some sort of agreement, probably about the upcoming case, but it's not clear.

Next to one of them sits a teenage boy. He is slouched down in his chair, mostly looking at the floor. He is silent, unless addressed by his chatty tablemates, particularly the one sitting next to him, who occasionally turns to him with an isolated question or two. "How's school?" "Everything okay at your aunt's?"

Right behind the chatty professionals and silent teen are a couple of well-dressed women who are engaged in a conversation of their own. They occasionally break into the table chat, clearly talking about the silent teen, or "Aunt," or "Mom," or "Grandma."

In the back of the courtroom sits an elderly woman. Is this "Aunt"? "Grandma"? Probably not "Mom." This is all evident from the woman's age and presence in the courtroom. No introductions are made.

At some point, someone walks in from a side door and begins to arrange things near the bench. She is warm and friendly with the table chatters, even joining in the chat. She looks at the teen and says "Take off your hat." Without warning, she directs "All rise," and a robed man walks in and takes the bench. One of the chatters makes a few statements in an acronym-studded rapid fire, and then calls on one of the well-dressed women to share a report. She stands to do so, running through the details of school, home and mental health treatment in a cascade of words. At the end of this report, she gestures to the back, "The aunt" (ah, it's the aunt) "is here in court, your honor. Is there anything you would like to say to the judge, Miss Jones?"

The aunt always has something to say. She has taken two buses to get to court, has waited for three hours with little or nothing to do or eat, and there is something, sometimes many somethings, that need to be done, or fixed, or responded to. Most on the list won't be done, or fixed, or responded to, at least not by anyone in the courtroom, but

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her commitment to the slouching teen is much appreciated and the looks and comments of all the adults in the room tell her so. The aunt's statement ends with a dramatic declaration to the judge, "I'm not sure how much more of this I can take," and the young person—the source of her exasperation but in no way the person to whom she is speaking—looks back down at the floor.

The second front table chatter gets his chance for a short burst of words after which he turns to the teen sitting beside him. "Do you have anything you want to say to the judge?" In response to this invitation the young person will likely shrug and shake his head. If induced to talk, the adults on both sides of the bench display some combination of concern and good will (or serious parental warning if that seems appropriate) as they listen, but the impatience is visible on many faces as well. The teenager is being politely waited out. At least that's how it looks. The teen's statement leads to no questions or conversation, nor does it change the course of the decisions made in any way. It does provoke an explanation from one of the nicely dressed women about why whatever is on the teen's mind doesn't fit with current plans.

After a brief lecture from the judge about what the young person needs to do (and does he understand?) the judge walks out, and the rest of those in the courtroom begin to collect their things to leave. A few comments are made to the young person, and one person shakes his hand. The chatters burst back into animated conversation about their out-of-court life. The aunt and the young person mumble something to one another, then look around to make sure the hearing is over and it is okay to go. Their irrelevance to the chatters soon makes this clear, and they leave.

I. INTRODUCTION

I have witnessed some version of this scenario many times over, in many juvenile courts, in many states. As an academic researcher, I have observed hearings in both the juvenile justice and child welfare systems. Before that, I spent several years at the table, representing children in foster care. What I have found is that the scene is remarkably similar in all "dispositional" or "dispositional review" hearings involving adolescents, whether the adolescent came into state custody as a result of a criminal charge or allegations of parental maltreatment.

Important details vary: Often the young person is not present at all. Sometimes he appears in handcuffs with a guard. Sometimes the family members cry. Often the young person dabs his eyes with his sleeve, determined not to cry. There are worse cases, where the judge and lawyers ignore the young person and his family altogether or speak with shocking disrespect. But I chose the details in the scenario to describe standard juvenile court proceedings at their best. The most concerned and dedicated judges and the most conscientious and hard working lawyers, caseworkers, and probation officers still come together to discuss young people's current needs and plans for the future in hearings that look like this one.

The problem is not, simply, that young people are not given a chance to speak; they often are. Rather, the problem is that, even when invited to speak, young people are in no way meaningfully engaged in the hearing. This is, in part, because it is hard for anyone other than the involved professionals to follow precisely which issues are being addressed in the hearing. These professionals, who handle case after case with one another in the same courtroom, follow hearing scripts and speak in a short hand that is familiar to them

and obscure to everyone else. It is also in part because, in an important sense, most of the decisions have been made before the hearing begins. Some decisions have been worked out between the lawyers and government actors over the phone, in the hallway outside the courtroom, or at meetings. Many have been worked out by repetitive practice. There is a strong sense of “the way things are done” that drives the planning and decision-making process in both the child welfare and juvenile justice systems. The hearing serves to make those decisions official and to get the court’s endorsement, but there is often very little left to be worked out.

If a young person succeeds in following the jargon-ridden presentations of the lawyers and various agents of the state, he sees that his role is that of a polite listener with a chance to say some words, not that of an active and engaged participant, let alone a chief author and executor of the plans for his future. This lack of engagement should be a concern at all hearings, but it is particularly troubling at dispositional hearings and subsequent reviews, where those plans, and the steps required to achieve them, are the primary focus.

In this essay, I argue that this juvenile court experience, the experience of adolescents in juvenile court in the vast majority of dispositional and review hearings, is unacceptable. It may violate their constitutional rights, and it certainly disserves their important developmental needs. At best, young people’s experience in court is a lost opportunity to nurture important aspects of their development in circumstances where we as a society have shifted some or all responsibility for that development from parents to the state. At worst, young people’s experience in court does developmental harm by reinforcing the message that they do not belong in the community that sets the rules. It is surely our minimal obligation, as lawyers and judges, to avoid causing this harm. But do we not also have an obligation, as participants in the system that has taken developmental responsibility for these children, to take every opportunity consistent with our roles to nurture their development? Whatever else we press state actors to do to help young people who have entered the juvenile justice and foster care systems, we lawyers and judges should take advantage of the opportunities offered in juvenile court to help these young people grow up.

As participants in this symposium celebrating twenty years of exceptional advocacy by Northwestern’s Children and Family Justice Center, we were asked to identify one or two major themes that should guide advocacy on behalf of children and their families for the next 20 years. My co-panelists identified some core themes with which I am in complete agreement: Addressing the underlying problem of poverty and the related problem of inadequate education is key to any real improvement in the lives of the families whose children are at risk of removal and arrest.¹ Moreover, recognizing the power of the ongoing connection between children and parents that makes children’s removal always harmful and almost always wrong is key to any significant reform of the

¹ See generally Bruce A. Boyer & Amy E. Halbrook, *Advocating for Children in Care in a Climate of Child Economic Recession: The Relationship Between Poverty and Maltreatment*, 6 NW. J. L. & SOC. POL’Y 300 (2011) (arguing that rates of child maltreatment increase with nearly every indicator of low socioeconomic status, including lack of a high school education and poverty).

child welfare system.² Similarly, keeping children out of jails and jail-like facilities is essential to their prospects for healthy development and a productive adulthood.³

I add to these a more narrow, focused, aim, but one that would require radical change and professional courage from lawyers and judges. While we serve children well by keeping most of them out of child protection or juvenile justice proceedings altogether, we owe those who come into the system treatment that reflects our special obligation to them and responds to their important developmental needs. In this essay, I focus particularly on adolescents and their treatment at the hands of judges and lawyers in juvenile court. While many of the issues these adolescents face circle back to the big themes identified by others (poverty, education, family preservation, etc.), adolescents in state custody face a special set of issues and opportunities created by their participation in juvenile court.

In dependency and delinquency proceedings, decisions are made that should reflect and surely will determine young people's life plans. Whether and when they become parents, how far and in what direction they go in school, whether they obey the law, with whom they associate, and how healthy they will be are only some of the important life outcomes that will be shaped by the decisions made in juvenile court. The planning process is important for young people not only because of its ultimate aim—their maturation into young adults capable of successful and independent adult functioning—but also because the process itself can develop skills and an understanding of self that can help them achieve that aim. But the current process is not designed to take any account of its developmental effects on young people, good or bad. The source of this deficit is not, for the most part, the law. Indeed, federal statute requires juvenile courts to “consult” with children in an “age-appropriate manner,” in all permanency planning reviews of child protection cases,⁴ and the due process protections afforded young people in court can readily be understood to embrace a right of participation that serves their developmental needs.⁵ Rather, the primary obstacle to change that would enhance the developmental value of the hearings is convention. The same actors appear in court day after day, and they all know what to expect of one another.⁶ Changing court processes will require some combination of lawyers and judges to depart from convention and take some chances. In the end, we will only learn if lawyers and judges can make the sort of difference I am calling for here if we give this changed approach a try.

² See Annette Ruth Appell, *The Myth of Separation*, 6 NW. J. L. & SOC. POL'Y 291 (2011).

³ See James Bell, Founder & Executive Dir., W. Haywood Burns Inst., Prepared Opening Remarks at the Northwestern Journal of Law and Social Policy's 2010 Symposium: Seize the Moment: Justice For the Child (Oct. 8, 2010), in 6 NW. J. L. & SOC. POL'Y 279 (2011).

⁴ 42 U.S.C. § 675(5)(C) (2008).

⁵ Emily Buss, *What the Law Should (and Should Not) Learn from Child Development Research*, 38 HOFSTRA L. REV. 13, 62 (arguing that due process rights are “particularly well suited for developmental-effects focused analysis” because participation is a core value of these rights, and children learn through their engagement in the process).

⁶ See Melissa L. Breger, *Making Waves or Keeping the Calm? Analyzing the Institutional Culture of Family Courts Through the Lens of Social Psychology Groupthink Theory*, 34 LAW & PSYCHOL. REV. 55 (2010) (arguing that the institutional culture of family courts, where lawyers, court administrators, caseworkers and judges interact with one another on a daily basis, has led to a form of “groupthink” that stifles conversation and innovation and discourages loyal client-centered advocacy).

II. THE DEVELOPMENTAL STAKES OF THE COURT PROCESS

In both dependency and delinquency proceedings, at disposition and beyond, planning for a young person's future plays a central role. In dependency proceedings, federal law requires the juvenile court to consider the design and implementation of a "case plan," which covers education, placement, and all other important aspects of the young person's life,⁷ and a "permanency plan," which looks to the young person's future.⁸ In delinquency proceedings, state legislation requires juvenile courts to impose consequences for wrongdoing that are designed to take account of the young person's current needs, and to prepare him for a productive, pro-social, adult future.⁹ But while state and federal law directs the juvenile court to order dispositions designed to help prepare young people for independent adulthood, young people's treatment in court by all present, including the most able and well-intentioned attorneys, thwarts this preparation.

Adolescents' experience in juvenile court disserves two primary developmental tasks of adolescence: the first task is gaining the experience required for competent decision-making and autonomous action, and the second is the development of an understanding of self, as an individual and a member of various groups and communities, that can guide those decisions and actions. After offering a brief description of these two developmental tasks and how they are accomplished, I will return to the juvenile court and how it falls short.

One of the primary developmental tasks for adolescents is learning to harness their newly acquired cognitive capacities to make "good decisions," that is, decisions that will allow them to assume responsibility for their own lives and function successfully in society.¹⁰ It takes practice to become a competent decision maker who can assess short and long-term interests, develop plans to serve those interests, act on those interests, and

⁷ 42 U.S.C. § 675(1)(A)–(C) (2009). This legislation allows for the content and implementation of the child welfare agency's case plan to be reviewed by either a court or an administrative entity, but for various reasons, historical and practical, states have assigned the bulk of this reviewing authority to the courts.

⁸ 42 U.S.C. § 675(5)(C)(i) (while the focus of permanency planning for younger children is generally either return home, adoption or guardianship, the most common permanency plan for older foster children is "another planned permanent living arrangement" or "APPLA," which contemplates a transition from foster care directly to independence in adulthood, with planning focused on future schooling, living arrangements, the need for mental health treatment and the like).

⁹ See, e.g., 705 ILL. COMP. STAT. 405/5-101 (2010) (stating that one of the "important purposes" of the Juvenile Justice system is "[t]o provide an individualized assessment of each . . . adjudicated delinquent juvenile, in order to rehabilitate and to prevent further delinquent behavior through the development of competency . . . [including] educational, vocational, social, emotional and basic life skills"). While states have shifted some attention to the aims of community safety and victim compensation in recent years, they have preserved in their statutory structure the aim of "rehabilitation," or "treatment" of offenders. And even the goals of victim compensation, community security and societal retribution are often couched in language that suggests these objectives can be achieved in a way that serves offenders' developmental interests as well. See, e.g., N.J. STAT. § 2A:4A-21 (2010) (directing courts to "insure that any services and sanctions for juveniles provide balanced attention to the protection of the community, the imposition of accountability for offenses committed, fostering interaction and dialogue between the offender, victim and community and the development of competencies to enable children to become responsible and productive members of the community").

¹⁰ See Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May be Less Culpable than Adults*, 18 BEHAV. SCI. L. 741, 744–45 (2000) (distinguishing adolescents' cognitive development, which is close to that of adults, from their psycho-social development, which lags behind and produces poor decisions).

then take responsibility for those actions. To be effective, this practice should occur in contexts in which adolescents care about the outcomes of the decisions being made.¹¹ Moreover, to ensure that adolescents have the opportunity to learn from their mistakes, it is also important that the decision making occur in contexts in which the decision-making process can be monitored and supported by caring adults. I will argue below that court hearings can offer precisely this combination: a focus on decisions that matter to young people in a context in which decisions and actions can be supervised and supported by concerned adults.

The second crucial developmental task of adolescence is identity formation, the process through which young people sort out who they are and how they relate to the rest of the world.¹² This process depends on young people's interactions with others, both adults and peers. Through these interactions, we learn how others perceive us and what they expect of us. This helps us understand ourselves and how we fit into the various communities with which we interact.¹³ Our relationships also give us opportunities to try on various identities, to explore various roles and values through both formal and informal group activities.¹⁴ Through these interactions with others, we hash out our understanding of our beliefs, our values, our personalities, and our affiliations. One aspect of this identity formation that is particularly important to adolescents' experiences in court is the development of an understanding of legal actors and institutions and one's own relationship to those actors and institutions. While there is an extensive literature that considers the legal socialization process among adults, research has just begun to explore how that socialization process relates to individuals' emerging identities in adolescence.¹⁵

Decision-making competence and identity formation are distinct developmental ends, but they are often served by a common set of experiences and interactions. Contexts in which young people are given decision-making authority over matters of importance to them and in which adults engage them in a manner that is supportive and respectful allow young people to develop decision-making skills, learn and recover from

¹¹ Emphasizing the importance of giving adolescents a chance to get meaningful practice making decisions for themselves, Frank Zimring has persuasively argued for a period of "semi-autonomy," during which adolescents are afforded some adult-like autonomy rights while being shielded from the most serious, negative consequences of their bad decisions. FRANKLIN E. ZIMRING, *THE CHANGING LEGAL WORLD OF ADOLESCENCE* 99, 103, 132 (1982).

¹² See LAURA E. BERK, *CHILD DEVELOPMENT* 463–69 (8th ed. 2009) (noting the importance of identity development in adolescence, and summarizing the relevant literature).

¹³ See, e.g., William B. Swann, Jr. & Jennifer K. Bosson, *Self and Identity*, in 1 *HANDBOOK OF SOCIAL PSYCHOLOGY* 1, 599–601 (Susan T. Fiske, Daniel T. Gilbert & Gardner Lindzey eds., 5th ed. 2010) (summarizing interpersonal origins of the self and identity).

¹⁴ See, e.g., Laura E. Berk, *CHILD DEV.* 466–69 (8th ed. 2009) (describing relational influences on identity development, and particularly, the way in which others offer adolescents an opportunity to explore various possible roles and values).

¹⁵ See Alex R. Piquero, Jeffrey Fagan, Edward P. Mulvey, Laurence Steinberg & Candice Odgers, *Developmental Trajectories of Legal Socialization Among Serious Adolescent Offenders*, 96 *J. CRIM. L. & CRIMINOLOGY* 267 (2005) (noting the limited research to date addressing how adolescents are socialized about the law through their life experience and the likelihood that "the process of legal socialization should be particularly salient during adolescence, since this is the developmental period during which individuals are beginning to form an adult-like understanding of society and its institutions, and when they venture outside the closed systems of family and schools to experience laws and rules in a variety of social contexts").

their mistakes, and build on their successes. In the course of doing so, young people also learn about themselves both as individuals and as members of groups that include those adults with whom they have engaged. Where that interaction is positive, adolescents might be expected to maximize the value of the practice and experience an affiliation with the involved adults and the institutions they represent. Where negative, we should worry both that their learning may be undermined, and that they may see themselves as opposed to, or at least disconnected from, the participating adults.

Along both of these developmental dimensions, young people's experience in juvenile court runs from empty to negative. Juvenile court proceedings offer young people little to no opportunity to practice making choices and taking responsibility for those choices, despite the focus at those proceedings on their current and future plans. To be sure, hearings are peppered with conditions, warnings and consequences directed at young people, but these are tied to their obligations under plans designed by others, not by themselves. Moreover, as the introductory scenario attempts to capture, the interactions young people have with various adults, including their caseworkers, their lawyers, and the judges, fail to convey any sense of connection between the young person and those adults or the communities they represent. If anything, the message young people get about their connection to the legal system and its actors is a destructive one: the court process puts on display an intimate and powerful community of legal actors representing government authority, and it is plainly a community from which the adolescent and his family are excluded.

It is fairly easy to make the case that current court proceedings disserve adolescents' primary developmental needs, but it is less obvious that courts offer good opportunities to serve these needs better. When children grow up in their families, they develop their decision-making skills and emerging sense of social and personal identity in their schools, their homes, and through various social and civic activities. An extensive literature documents the value to adolescents of parents who offer them opportunities to exercise some autonomy within the context of a caring relationship where parents continue to exercise some control.¹⁶ An equally extensive literature documents the value of adolescents' involvement in extra-curricular activities that give them considerable responsibility and decision-making control while fostering their engagement with peers and non-family adult role models.¹⁷ Where such intra- and extra-familial opportunities

¹⁶ See, e.g., Brett Laursen & W. Andrew Collins, *Parent-Child Relationships During Adolescence*, in 1 HANDBOOK OF ADOLESCENT PSYCHOLOGY 26–29 (Richard M. Lerner & Laurence Steinberg eds., 3d ed. 2009) (reporting research that suggests that “authoritative” parents, that is, parents who give their children considerable room to make decisions, while showing warmth and engaging in ongoing supervision, most successfully prepare their children for independence and social competence).

¹⁷ See, e.g., Jodi B. Dworkin et al., *Adolescents' Accounts of Growth Experiences in Youth Activities*, 32 J. YOUTH & ADOLESCENCE 17, 20–24 (2003); Jacquelynne S. Eccles et al., *Extracurricular Activities and Adolescent Development*, 59 J. SOC. ISSUES 865, 876 (2003); Joseph L. Mahoney et al., *Promoting Interpersonal Competence and Educational Success Through Extracurricular Activity Participation*, 95 J. EDUC. PSYCHOL. 409, 415–17 (2003); Joseph L. Mahoney, Deborah Lowe Vandell, Sandra Simpkins & Nicole Zarrett, *Adolescent Out-of-School Activities*, in 2 HANDBOOK OF ADOLESCENT PSYCHOLOGY 251 (Richard M. Lerner & Laurence Steinberg eds., 3d ed. 2009) (“[O]rganized activity participation allows youth to practice social, physical, and cognitive skills that are useful in multiple settings . . . try on new roles/identities in a safe environment; receive support from caring adults and peers; experience and navigate intra- and interpersonal challenges and goals; and foster positive connections between family, school, and community.”).

are available and productive for young people, they can be expected to have a significantly greater developmental impact than court hearings, because the adults involved will generally have more contact and deeper relationships with these young people than court personnel can be expected to have.

For those involved in the juvenile justice and child welfare systems, however, these more conventional opportunities for skill-building and pro-social identity development are far less available. Adolescents in the child welfare system, who come from homes in which they were found to be abused and neglected, are less likely to have been provided with structured and supportive opportunities for independent decision making in those homes. Their foster care placements are the least stable of any age group, and they often end up in group homes, rather than in family settings.¹⁸ Neither unstable foster family placements, nor discipline-oriented group homes are conducive to fostering adolescents' experimentation with independent decision making or their exploration of groups and activities in their communities. Even those adolescents who live in stable family foster care are deprived of the opportunities afforded adolescents in developmentally appropriate homes of origin. This is in large part because the foster care system is focused on protecting young people from harm and their agencies from liability. These twin concerns, joined with the bureaucratic complications of funding and transportation, dramatically curtail foster youths' opportunities to exercise their independence in organizations and activities outside the home.¹⁹

For a somewhat different set of reasons, adolescents in the juvenile justice system are also likely to be cut off from important developmental opportunities in their home communities. First, many of these adolescents have parents whose care-giving is comparable to those whose children end up in foster care.²⁰ Second, adolescents in the juvenile justice system are particularly likely to have attended poorly performing schools and to have failed or dropped out of school.²¹ And finally, even if they live in communities where productive extra-curricular activities are offered, their own behavior, leading to their delinquency adjudication, often reflects a lack of engagement with those activities.

¹⁸ See, e.g., ANNETTE SEMANCHIN, JONES & SUSAN J. WELLS, PATH/WISCONSIN-BREMER PROJECT: PREVENTING PLACEMENT DISRUPTIONS IN FOSTER CARE, FINAL REPORT (2008) (citing multiple studies that suggest that older children are at greater risk of foster care placement disruption); MARK E. COURTNEY, SHERRI TERAQ & NOEL BOST, CHAPIN HALL CENTER FOR CHILDREN AT THE UNIVERSITY OF CHICAGO, MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: CONDITIONS OF YOUTH PREPARING TO LEAVE STATE CARE (2004) (reporting that approximately eighteen percent of their subjects, seventeen-year-olds in foster care, live in group homes or residential treatment facilities).

¹⁹ See EMILY BUSS ET AL., UNIVERSITY OF CHICAGO LAW SCHOOL FOSTER CARE PROJECT'S PROTOCOL FOR REFORM, FROM FOSTER CARE TO ADULTHOOD 36 (2008).

²⁰ See, e.g., Lisa Ells, Note, *Juvenile Psychopathy: The Hollow Promise of Prediction*, 105 COLUM. L. REV. 158 (2005) (citing evidence that "abused and neglected children [are a] group already overrepresented in the juvenile justice system"); ELLIOTT CURRIE, CRIME AND PUNISHMENT IN AMERICA 82 (1998) (citing evidence suggesting that children who were abused and neglected are more likely to engage in violent criminal offending in adolescence).

²¹ See, e.g., RUTH CURRAN NEILD & ROBERT BALFANZ, UNFULFILLED PROMISE: THE DIMENSIONS AND CHARACTERISTICS OF PHILADELPHIA'S DROPOUT CRISIS, 2000-2005 32 (2006), http://www.csos.jhu.edu/new/Neild_Balfanz_06.pdf (reporting that 22.6 percent of male dropouts end up in juvenile justice placements, compared to 2.2 percent of graduates); Philip J. Cook, Denise C. Gottfredson & Chongmin Na, *School Crime Control and Prevention* 313, 338 (2009) (noting the correlation between chronic truancy and delinquency, among other problems).

For young people in the juvenile justice and child welfare systems, juvenile court might be the last opportunity, and might also be a particularly good opportunity, for the state to assist them in developing their decision-making skills and to influence their emerging understanding of themselves and their relationship to the law and the government that implements it. “Last” for young people in the child welfare system because they will soon be expected to function as competent adults with far fewer ongoing supports than those afforded to young adults who grow up in their own families.²² And “last” for young people involved in the juvenile justice system because juvenile court jurisdiction is designed to capture young people on the brink of adulthood and help them develop pro-social skills, attitudes, and behavior before they age into the more purely punitive adult criminal justice system. And “particularly good,” because the legal actors involved, particularly the judges, so clearly represent government authority in a human form and in a context with evident relevance to the juveniles’ lives.

As the legal entity with authority to oversee a young person’s long- and short-term planning, the court has a unique ability to shift decision-making control to young people and to support that shift by removing obstacles and demanding assistance from those state agents to whom responsibility for the adolescents has been assigned. Moreover, when a judge, whose legal authority is well understood, shows a young person respect and attention, we have reason to hope that that the young person may translate that positive, concrete, human relationship into a more positive conception of the legal system that the judge is understood to represent. In the section that follows, I explore innovations and social scientific findings that suggest that adolescents might benefit from a shift in court practice toward these ends. After exploring these innovations and findings, most of which have been developed outside the conventional juvenile court hearing process, I return to a consideration of how their lessons might be applied to improve the value of juvenile court proceedings for juveniles.

A. Developmental Opportunities in Child Welfare Proceedings

Experiments in the child welfare context suggest that judges can play a special role in fostering the development of adolescents who have grown up in state custody if they are willing to structure their hearings in a dramatically different way. The most notable example of this shift in approach is the Cook County Juvenile Court’s Benchmark Permanency Hearings, which have served as a model for a small number of other forward-thinking child welfare courts around the country.²³ This approach was developed in large part by the single Cook County judge originally assigned to hear the cases of older teens in foster care. At the Benchmark Hearings the judge and the young person (ranging in age from sixteen to twenty-one) are the two primary participants, and they engage in a direct conversation focused on the young person’s short and long-term goals. As these goals are fleshed out, the judge can manifest the state’s power and support by ordering the cooperation and support of the state actors’ charged with the

²² BUSS ET AL., *supra* note 19, at 3 (noting that foster youth are required to take on full responsibility for themselves as soon as they “age out” of the system, whereas youth growing up in their own homes continue to rely on their parents for material and emotional support well into their adult years).

²³ See COOK COUNTY CHILD PROTECTION DIVISION, A COURT GUIDE FOR CASEWORKERS 61–71, *available at* http://www.cookcountycourt.org/divisions/cp/docs/Child_Protection_Division_Caseworker_Manual.pdf, for detailed information on the Benchmark Permanency Hearings.

young person's care. While the young person's lawyer is present, she is largely silent, though in the best cases she has done considerable work with the young person in preparation for the hearing, and she is prepared to take action following the hearing to ensure compliance with the judge's orders. The young person is also encouraged to bring an adult who can serve as a source of support at the hearing and on an ongoing basis as the young person pursues the goals established there.

With the young person's greater role in the proceedings comes greater responsibility and accountability as well. The young person develops a written "contract" with the judge that serves as the basis for services provided in support of the young person's ambitions and as a record of the commitments made by the young person. At the next hearing, which will often be scheduled within weeks or even days of the previous hearing, the court will assess the young person's compliance with those commitments as well as the state agency's compliance with the obligations imposed by court order at the earlier hearing. As in other caring relationships between adolescent and adult, where the adult sees his role as that of helping the adolescent prepare for competent, independent decision making, the judge responds to the failures of the young person by expressing disappointment and exploring what can be done to avoid the failure in the future, rather than simply by lecturing, or removing a privilege, as is standard fare at an ordinary court review.

This is not to say that there is no place for lectures and the imposition of consequences in juvenile court. Rather, it means that these responses must be embedded in the context of a relationship and accompanied by a message of support and assistance if they are to be effective teaching tools. Such relationships and interactions between adults and adolescents are commonplace in families, schools, neighborhoods, clubs and religious institutions. While, again, it is preferable to nurture these relationships in such other contexts, the Benchmark proceedings were developed to address a relational void in the lives of adolescents in foster care. A relationship between judge and adolescent will necessarily be less intimate than a relationship between family members or close friends, but the success of the Benchmark proceedings is tied to the judge's commitment to developing her relationship with the adolescents in her courtroom to the maximum extent possible in that context.

While not yet formally studied, the Benchmark hearing process has been praised by former participants²⁴ and imitated in other jurisdictions.²⁵ The Benchmark process is

²⁴ See Nara Schoenberg, *Young Woman Moves on, Creates New Life*, CHI. TRIB., Dec. 30, 2005, available at http://articles.chicagotribune.com/2005-12-30/features/0512300001_1_foster-care-system-benchmark-program-preschool (reporting that a former foster youth now working as a pre-school teacher has "high praise for the Benchmark program" and the judge who presided, and stated that "they helped me become the person I am today").

²⁵ See, e.g., Christopher Smith, *Study: Courts Can Do Better with Long-Term Foster Care*, TEX. TRIB., Jan. 20, 2011, <http://www.texastribune.org/texas-courts/texas-supreme-court/courts-can-do-better-with-long-term-foster-care/> (reporting study recommending the implementation of a Benchmark Permanency Hearing process to improve the outcomes of foster youth aging out of care and suggesting that "judges learn to see their role not as arbitrators of a dispute, but as people responsible for the well-being of a child"); Mary Bissel, *Not Ready to Go It Alone*, WASH. POST, May 15, 2005, available at http://newamerica.net/publications/articles/2005/not_ready_to_go_it_alone (describing problems with the assistance given to foster youth aging out of care, and identifying Washington D.C.'s implementation of a benchmark permanency hearing as one of the positive attempts to address the problem); see also *National Council Model Court Profiles*, NAT'L COUNCIL JUV. & FAMILY CT. JUDGES,

frequently held up as one of the ways to improve foster youths' preparation for independence, and the emphasis on better youth participation, decision-making, follow-up and support is consistent with my emphasis on affording young people decision-making practice. Unstudied is the effect of the process on young people's attitude toward legal actors and institutions, and particularly how the positive relationship with a single judge translates into these more generalized attitudes. As the single best existing example of what I propose here, these Benchmark hearings offer an excellent opportunity to begin to study the developmental effects for adolescents of this very different treatment in juvenile court.

B. Developmental Opportunities in Juvenile Justice Proceedings

In juvenile justice proceedings, the developmental deficits the adolescents bring to court can also be expected to be great. And because their offending reflects problematic decision making and a certain openness to defining themselves as outside of, or even in opposition to, the systems of laws and legal actors that govern them, we should be particularly eager to afford these young people opportunities to develop their decision-making competence and engage with government actors in positive ways. Moreover, whereas my primary concern in the child welfare context is that the current court process represents an important lost opportunity, my concern about the current juvenile justice process is both that it fails to nurture positive developmental opportunities and also that it may impose developmental harm. For offenders, the failure of the process may reinforce or exacerbate their sense of outlier status, and push their emerging identities in an anti-social direction.

A number of related bodies of research suggest that young people's experience in juvenile court might shape their social identity in positive or negative ways. Primary among them is the research that studies "legal socialization," that is, how we come to hold the views we hold about legal actors and legal institutions and whether and why we should obey the law. Social psychological research suggests that adults' treatment in court processes affects their attitudes about the law, and that they are more likely to see legal authority as legitimate and feel an obligation to obey the law if they have been shown respect and given an opportunity for meaningful participation in their judicial proceedings.²⁶ The connection between adults' perceptions of "procedural justice,"²⁷ their belief in the law's legitimacy, and their sense of obligation to obey the law has been repeatedly demonstrated.²⁸

We might expect that this effect would be even more marked among adolescents for whom formulating beliefs about self and society is a central developmental task. Preliminary research studying adolescents' response to police interactions does indeed suggest a correlation between personal experience with legal actors and attitudes formed

<http://www.ncjfcj.org/content/blogcategory/112/151/> (describing the Model Courts supported by the National Council of Juvenile and Family Court Judges, a number of which were modeled after the Cook County Benchmark Hearings).

²⁶ See, e.g., TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006).

²⁷ *Id.*

²⁸ Tom R. Tyler, *Legitimacy and Criminal Justice: The Benefits of Self-Regulation*, 7 OHIO STATE J. CRIM. L. 307, 313–14 (2009).

about the legal system.²⁹ In this research, perceived fair treatment by legal actors was correlated with adolescents' greater respect for legal authority, whereas treatment perceived as unfair or harsh was associated with cynical views about the law. Another study suggests that the influence their experience in the juvenile justice system has on adolescents' legal socialization may plateau in middle adolescence, but this research only begs the question of how that influence might change in form and in duration, if adolescents were involved in a dramatically different process in juvenile court.³⁰

Other research, conducted in different but relevant contexts, highlights the potential positive and negative effects of adolescents' treatment in juvenile court. Supporting the positive potential of significantly altered procedures is the research focused on "restorative justice" approaches, which correlates pro-social offender effects with the offender's opportunity for direct and supported engagement with his victim and the involved communities.³¹ Suggesting that status quo procedures could have a negative effect on adolescents' attitudes about the law are a constellation of theories, including "defiance theory" and "self-categorization theory," that correlate anti-social conduct, and society's response to that conduct, with the development of an out-group mentality.³² Although we know little for certain about the current or potential effect of children's experience in court on their attitudes about the law and their place in legal institutions, we know more than enough to conclude that the matter is worthy of further study and experimentation.

C. *Deriving Developmental Value from Process Rights*

Narrowly defined, the term "legal socialization" focuses on the process that leads people to embrace the authority of law and their obligation to obey the law. This is clearly an important developmental goal for any society. But our broader ambition for our young citizens should be their embrace of a sense of self as *part of*, rather than *distinct from*, the society that makes and enforces the laws. We aim to produce citizens who not only perceive their legal institutions and actors as legitimate and therefore worthy of obedience, but also as *their* system, a system they can take part in and not simply be ruled by. Already discussed is the likely developmental value to adolescents of being afforded a meaningful opportunity to participate in their hearings. Here, I focus on the particular value for social and individual identity development that might come from engendering a conception of that participation as a matter of right.

Young people are particularly likely to come to understand themselves as members of the community that makes and enforces the law if they conceive of their participation as an entitlement, afforded to them simply by virtue of that membership. But there are two sorts of difficulties associated with asserting rights on behalf of adolescents that may

²⁹ Jeffrey Fagan & Tom R. Tyler, *Legal Socialization of Children and Adolescents*, 18 SOC. JUST. RES. 217, 236 (2005).

³⁰ See Piquero et al., *supra* note 15, at 267 (2005).

³¹ JOHN BRAITHWAITE, RESTORATIVE JUSTICE & RESPONSIVE REGULATION 78–79 (2002) (suggesting that one explanation for the success of restorative justice programs is that youthful offenders are more likely to understand what is going on, to feel more empowered to express their views, and to feel more respected than in conventional court proceedings).

³² See *id.* at 81–90 (describing defiance and self-categorization theory and noting the role that disrespect for the sanctioning authority plays in encouraging defiance or out-group identification).

diminish the developmental value of those rights assertions. The first difficulty is one of comprehension. The idea that their rights are in no way contingent on the consent of adults in authority is not an easy concept for young people to understand, for it flies in the face of their entire life experience. Asserting and preserving the rights of young people therefore requires a special commitment and persistence among the lawyers and judges responsible for safeguarding those rights. Moreover, to truly communicate the significance of their actions, lawyers and judges must take special pains to make these rights enforcements visible and comprehensible. At its best, a lawyer's assertion, or a judge's acknowledgement, of an adolescent's right of participation not only secures that young person's participation, but also teaches the young person something about the value the system places on that participation.

The second difficulty in deriving developmental value from the assertion of adolescents' rights reflects a deeper problem of design. Unless rights of participation are designed to ensure that adolescents experience that participation in some meaningful way, an assertion of these rights cannot be expected to engender any sense of membership in the legal community that sits in judgment.

We have made very little headway in securing meaningful participation for adolescents, despite statutory and constitutional authority to do so. In the child welfare context, as already noted, statutory language mandates that courts "consult" with young people in an "age-appropriate manner," as part of the court's yearly review of their permanency plans.³³ But the thinness of efforts by federal regulators, state child welfare agencies, children's lawyers, or juvenile courts to alter practices when this consultation requirement was added to the law is more evidence of the legal system's complacent acceptance of a developmentally unacceptable status quo.³⁴ Moreover, efforts to assert young people's due process right to participate in child welfare proceedings have also been minimal, focusing on the child's right to counsel in the few cases brought.³⁵

In the juvenile justice context, due process challenges are routine, but their focus has not been on young people's meaningful participation in their hearings. Rather, the focus has been on securing as many adult criminal procedural rights as possible as a safeguard against unwarranted exercises of state power. The due process rights secured in *In re Gault*³⁶ and subsequent cases, including the right to counsel, to notice of proceedings, to call and cross-examine witnesses, and to avoid self-incrimination, have enhanced young people's ability to resist the force of the state in important ways. But this adult conception of due process rights has continued to box children out of the

³³ 42 U.S.C. § 675(5)(C) (2008). More recently, Congress added an additional requirement that every adolescent transitioning to adulthood have a "transition plan" that is "personalized at the direction of the child . . . and is as detailed as the child may elect." Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, § 202(3), 122 Stat. 3949, 3959 (2008).

³⁴ See *In re Pedro M.*, 864 N.Y.S.2d 869, 870 (N.Y. Fam. Ct. 2008), for a notable exception. That case interpreted the consultation requirement, and New York's implementing legislation, to create a presumption that a child age seven or older will be present in court for his hearings. As the scenario set out at the beginning of this Article illustrates, however, court attendance, itself hard to achieve, is hardly sufficient to secure the active and meaningful participation championed here.

³⁵ A state constitutional version of this claim was successful in *Kenny A. ex rel. Winn v. Perdue*. 356 F. Supp. 2d 1353 (N.D. Ga. 2005) (concluding that Georgia's constitution affords children a due process right to counsel in child protection proceedings, based in large part on cases interpreting the due process clause of the U.S. Constitution).

³⁶ *In re Gault*, 387 U.S. 1 (1967).

proceedings, as lawyers speak for them in a language and format incomprehensible to most who listen.³⁷

For reasons discussed below, the trade-off between effective resistance to state power through standard criminal defense lawyering and more meaningful youth engagement through a shift in control of the discussion to the youth favors conventional lawyerly control when the court is adjudicating guilt. But it is not clear that the trade-off is the same once a young person has been adjudicated delinquent and the focus shifts to dispositional aims.³⁸ At this stage in the proceedings, we should worry about a system that claims to address young people's need for treatment and support and to hold young people responsible for their actions, without meaningfully engaging young people in the process that makes those assessments and assigns that responsibility. While the assertion of young people's participation rights under federal statutes and the Constitution offers a foothold for lawyers interested in pressing for radical procedural reform, a recognition of these rights in no way guarantees a departure from the status quo.

III. REMAKING JUVENILE COURT TO SERVE ADOLESCENTS' DEVELOPMENTAL NEEDS

As lawyers and judges charged with promoting young people's well-being through their involvement in juvenile court, we should press for a court process that serves young people's developmental needs. Such a process requires a fundamental change in the structure of juvenile court hearings, the role played by the young person, and the interaction between the young person and the other actors in the courtroom. Bringing the young person to the center of the hearing—the center of discussion, the center of decision making, and planning—could give these young people two interrelated sorts of experience that social science research, as well as common sense, associate with positive adolescent development. First, the new process could give the juveniles essential experience making decisions about, and taking responsibility for, their lives in a supportive context, where mistakes can be reflected upon and corrected and successes applauded and built upon. Second, the process could foster a relationship between judge and juvenile that would nurture the juvenile's sense of self as part of, rather than outside of or in opposition to, our system of laws and legal actors.

Our aim should be to engage young people directly and repeatedly in discussions with a single judge to address all issues of planning and implementation associated with their dispositions. It should not be enough to give a young person an opportunity for input—whether that input is provided through legal representation or an occasional opportunity to speak in court. Rather, the juvenile should be given important responsibility and decision-making authority throughout the process. To ensure this level of involvement and control, all decisions relevant to the young person's care, treatment, education, punishment, and plans for the future should be discussed clearly and completely at hearings, with sufficient advance warning of the matters to be discussed to allow the young person to prepare to take positions and play a substantial role in the

³⁷ Emily Buss, *The Missed Opportunity in Gault*, 70 U. CHI. L. REV. 39, 48–49 (2003).

³⁸ Of course the more purely punitive the dispositions ordered, the greater the continuing need for lawyer led legal representation. Conversely, the more the dispositional hearing and reviews focus on the current and future needs of the juvenile, the more valuable the shift from formal, lawyer led representation to the direct participation of the adolescent.

discussion. This is not to suggest that all juveniles would readily embrace this greater role. The point is not that young people are ready to assume these responsibilities, but rather that they are ready to begin to learn, and will need our help in doing so. Again, our aim should be to nurture a set of skills and sense of self among juveniles that increases their chance of becoming successful adult participants in our political community.

While reforms along the lines I propose would be dramatic, they would not require substantial changes in the law or in the stated purposes of the juvenile court. As noted, the law already provides some support for a right of participation, and a central aim of juvenile court proceedings is serving the needs of those whose life circumstances have brought them into court. For at least three reasons, the proposed reforms could be most easily and appropriately implemented in dispositional hearings and reviews. First, these hearings do not implicate some of the delicate and difficult constitutional issues that would arise if the process of adjudication, that is, fact-finding to determine guilt, were shifted away from counsel and conventional adult procedural rights and toward a more open, unrestrained conversation between the judge and young person.³⁹ Second, the clear benefits of keeping children with their families and out of the child welfare and juvenile justice systems favor a more conventional criminal procedural rights based process for the adjudicatory phase. And, third, the issues addressed in dispositional hearings and reviews—that is, the needs of and plans for the young person, and the state's response to those needs and plans—are particularly well suited to the sort of youth involvement I contemplate.

As noted, versions of what I propose here have been implemented successfully in a small number of dependency courtrooms, and my call for reform in child welfare cases can be conceived as a call to study those successes, and move from pilot programs to more widespread implementation. In the juvenile justice context, experimentation with reforms based on similar aims has occurred largely, if not exclusively, in programs designed to keep young people out of court.⁴⁰ But some young people end up in court, and we can predict that those who do are likely to be at least as developmentally needy as those who do not. Instead of offering these young people versions of the scenario described at the beginning of this essay, we need to bring whatever successes are being developed outside the court setting into the courtroom. There, the special authority of the judge and the special nature of the proceedings should be harnessed to counteract rather than exacerbate the many developmental disadvantages that have led to, or been produced by, the state's involvement.

Changes like those envisioned here will only occur if the judges and lawyers who populate juvenile court proceedings press for change. As the Benchmark Hearings in Cook County demonstrate, a single visionary judge can do a great deal for the young people on her docket. It is my hope that a handful of judges, even one judge, in the delinquency system will be so appalled by the status quo, and comfortable pushing the envelope, that they (or she) will be willing to try some version of Benchmark-style hearings in the juvenile justice system. Even a small experiment could teach us a lot about what is possible to accomplish in that system.

³⁹ See *In re Gault*, 387 U.S. at 13 (noting that its holding that the due process clause entitles juveniles to a number of adult criminal procedural rights applies only to the adjudication phase, at which it is determined whether the juvenile committed an offense that could justify the deprivation of his liberty).

⁴⁰ See BRAITHWAITE, *supra* note 31.

Lawyers, too, can press for this change, though, of course, they do not have the same direct control over the process that judges have. Indeed, for lawyers to move the process in the right direction they must be willing to make themselves extremely unpopular in the courtroom. They need to abandon the comfortable chat described in the opening scenario and the camaraderie it reflects among the league of professionals who share more of a bond with one another in the courtroom than they share with their clients. They need to make demands on themselves, on the other lawyers, and on the judges, that will require a great deal of additional work and creativity. To push for these reforms, lawyers must be ready to push against the other participants' expectations and judges' long-protected timetables. Indeed, they may need to set judges up for exasperation, if not embarrassment, by refusing to agree to hearings that occur during school hours and insisting that hearings be slowed down and unpacked so that their clients can meaningfully track, and then participate in, all the decisions that are made.

I know, from many years of practice in juvenile court, that opposing the court's standard operating procedures is professionally risky and emotionally nearly impossible. Even those among us who were comfortable challenging the state's position on substantive grounds, whether it was pressing for expensive services or for the return home of a child, never pressed for real procedural reforms, for a radically different role for our clients (and ourselves). It took my passive observation of many court hearings after moving to academia to focus my attention on the developmental implications of young people's experience in court, and to reach the conclusion that the current state of procedural affairs is unacceptable. Continuing to advocate at the margins within this failed procedural model feels like zealous advocacy in the world of juvenile court. It should be reconceived as complicity, and abandoned in pursuit of real, developmentally appropriate change.